2. Is recovery upon breach of the condition of such a bond given by one holding such a permit limited to actual damages sustained by the United States?

In the *Zerbey* case the United States filed its statement of claim in the District Court of the United States for the Middle District of Pennsylvania for the recovery from Zerbey and the National Surety Company, his surety, of the full amount named in a Form 738 permit bond executed by Zerbey and the condition of which it was alleged he had breached. The District Court sustained a demurrer to the statement of claim, holding that the bond was not a forfeiture bond but a mere indemnity bond, and that, as under the pleadings no pecuniary loss or damage was alleged to have been suffered by reason of the alleged breach, the action could not be maintained. The statement of claim was accordingly dismissed, and the United States took the case on writ of error to the Circuit Court of Appeals, which has certified to this court questions identical with those certified in the *Lederer case*.

In view of the decision of this Court in *Sage* v. *United States*, 250 U. S. 33, it is doubtful that Lederer had the right, in the action brought against him by O'Kane, to set up as a counterclaim an obligation alleged to be due and owing to the United States. Apprehending that this Court might regard the bond questions as not involved in the *Lederer case*, and therefore decline

to answer the questions certified therein, the Government pressed action in the lower courts in the *Zerbey case,* wherein the same questions were unmistakably involved, in order that if the certificate in the *Lederer case* should be dismissed a decision by this Court of these questions might not be unduly delayed.

An early decision by this Court of these bond questions is of very great importance to the Government in its administration of the prohibition and revenue laws. Court proceedings in many similar cases are being held in abeyance pending such decision, which will also determine the rights of the Government in bonds, bearing like conditions, aggregating potential liabilities of many millions of dollars.

Because of the apparent defect in the *Lederer case* certificate the Government will be content to present its argument to this Court in that case by brief only. As, however, the many thousands of these Form 738 bonds, as well as of other bonds having similar conditions, which are outstanding, will be valueless unless the Government can sustain its contention that they are penal bonds as distinguished from mere indemnity bonds, because it can not show that the United States suffers any pecuniary loss from their breach, the questions certified are regarded by the Government as of such gravity as to require oral argument in the *Zerbey case* for the full time allowed by the rules

in cases in which questions have been certified to this court.

Notice of this motion has been served on opposing counsel.

Respectfully submitted.

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Solicitor General.

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OCTOBER, 1925.

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